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Federal Communications Commission
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March 26, 1991

Ms. Donna Searcy, Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Application of Telephone and Data Systems, Inc.
To Establish A New System In the DPCRTS To
Provide Service In Wisconsin RSA #8 - Vernon
(File No. 10209-CL-P-715-B-88)

Dear Ms. Searcy:

Herewith transmitted, on behalf of Telephone and Data Systems, Inc. ("TDS"), are an original and four copies of its "Opposition" to the "Application For Review" filed by Century Cellunet et al. with respect to the Common Carrier Bureau's Order on Reconsideration (DA 90-1917), released January 15, 1991 in the above-referenced proceeding.

Pursuant to Section 22.6 of the FCC's Rules, three microfiche copies of this "Opposition" are being filed herewith.

In the event there are any questions concerning this matter, please communicate with this office.

Very truly yours,

Peter M. Connolly

Enclosures

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Office of the Secretary

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In re Application of	)	
	)	
TELEPHONE AND DATA SYSTEMS, INC.[1]	)	
	)	
For Authority To Construct And Operate A Domestic Public Telecommunications System On Frequency Block B To Serve Wisconsin RSA #8 - Vernon	)	File No. 10209-CL-P-715-B-88

OPPOSITION TO APPLICATION FOR REVIEW

Telephone and Data Systems, Inc. ("TDS"), by its attorneys, hereby files its Opposition to the Application For Review filed by Century Cellunet, Inc. and other wireline applicants in Wisconsin RSA #8 - Vernon (hereafter "Settling Parties").

For the reasons discussed in TDS's "Contingent Application For Review," filed February 25, 1991, and those given below, Settling Parties' Application For Review should be denied and TDS's construction permit grant should be affirmed.

I. The Bureau's Opinion Reflected The Correct Belief That It Would Be Inequitable and Contrary to Law To Dismiss TDS's Application

In our Contingent Application For Review, TDS demonstrated that the Common Carrier Bureau erred in holding that a technical violation of Section 22.921(b)(1) had occurred when UTELCO, Inc.

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[1] On March 21, 1991, the FCC was notified of the consummation of the pro forma assignment of Telephone and Data Systems, Inc.'s license in Wisconsin RSA #8 - Vernon to its wholly owned subsidiary Wisconsin RSA #8, Inc. See File No. 08426-CL-AL-1-91.

entered into a settlement agreement with Settling Parties. As we showed, parties to a settlement agreement are not given an "ownership interest" in each others' applications within the meaning of Section 22.921(b)(1). We will not repeat that argument here, though we incorporate it by reference.

However, though the Bureau's reasoning concerning Section 22.921(b)(1) was mistaken, its decision not to dismiss TDS's application was manifestly correct.

UTELCO was not an applicant in Wisconsin RSA #8. Its admission into Settling Parties' settlement group cannot now be considered a basis for requiring the dismissal of TDS's application pursuant to a rule which, by its terms, covers only interests held in applications. Section 22.921(b)(1) does not, in terms, refer to contingent "interests" created by settlement agreements and does not do so by logical implication, as the Mobile Services Division agreed the first time it reviewed this matter. And, as we have discussed in our Contingent Application For Review, the standard prescribed by rules requiring the dismissal of applications must be clear and unambiguous. The possible application of Section 22.921(b)(1) in this context was anything but clear, as the MSD recognized in holding that it did not apply. The Common Carrier Bureau also implicitly recognized this in refusing to dismiss TDS's application despite finding that the rule had been violated. And no court would ever hold an applicant to a higher standard of knowledge concerning the application of a rule than that possessed by the agency which promulgated and enforced the rule.

However, Settling Parties have refused to recognize that it would be inequitable and unfair to require the dismissal of TDS's application because of a settlement agreement which they entered into with a non-applicant in which TDS holds a minority interest. Rather, they have persistently asserted, in addition to their strictly legal arguments, that they have been the victims of deception, unfairness and "bad faith" on the part of TDS. These claims, however, are entirely specious.

It is a fact that TDS did not sign the Wisconsin RSA #8 settlement agreement. This may have disappointed Settling Parties, who have devoted much space in their pleadings to self-serving descriptions of the Wisconsin RSA #8 negotiations, but TDS was certainly within its rights not to do so. However, thirteen of the sixteen wireline applicants in the RSA did sign the settlement agreement and so it was likely that a member of the settlement group would win the lottery. But TDS happened to win, and it is that event, not any "deception" or "bad faith" on TDS's part, which is the actual source of Settling Parties' chagrin.

Settling parties have maintained, in essence, that they permitted UTELCO into their settlement group only on the understanding that TDS would also sign the settlement agreement. In short, they argue that TDS' entry into the settlement group would have been the "consideration" for UTELCO's participation. But if that was the case, then if a member of the settlement group had won the lottery, UTELCO could simply have been excluded from the licensee partnership. As Settling Parties know, the FCC never

would have enforced a claim by UTELCO of entitlement to participation in the licensee partnership,[2] and, if Settling Parties are right about the circumstances under which UTELCO signed the agreement, then neither would any state court have held that UTELCO had a right to inclusion. Settling Parties' whining about "bad faith" and their bogus calculations (Application For Review, p. 11) of the "dilution" of their interests in their own settlement group as a consequence of UTELCO's entry into it, ignore the essential fact that UTELCO had no interest in Settling Parties' applications and would have had no interest in their licensee partnership unless one of their number had won the lottery and they then chose to give UTELCO such an interest. There was no unfair "skewing" of the lottery of the kind that Section 22.921(b)(1) was intended to prevent, as such skewing could take place only if the forbidden cross-interests existed among lottery participants.[3] UTELCO was not a lottery participant and could have been excluded from the licensee partnership at Settling Parties' option. If Settling Parties were, in fact, treated unfairly by TDS (which we have denied) and had one of them won the lottery, then they obviously had it within their power to rectify any such "injustice" by excluding UTELCO. But none of them did win and that was no more

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2 See American Cellular Network Corp. of Nevada, 63 R.R. 2d 1313 (1987).

3 Every case cited by Settling Parties (Application For Review, p. 13) in which a violation of Section 22.921(b)(1) was found to require the dismissal of an application involved forbidden cross interest among applicants.

an "injustice" than when a coin comes up "heads" instead of "tails."

II. The Settlement Agreement Never Became Operative and Hence Did Not Create Any Interests or Obligations For Anyone

Settling Parties assume that UTELCO's entry into their settlement agreement both gave TDS a forbidden interest in their applications and created obligations on their part toward UTELCO.

However, the Wisconsin RSA #8 settlement agreement, by its terms, has never become operative and therefore cannot create rights or obligations for its signatories, let alone non-parties.

Section 6(a) of the Agreement, previously submitted by UTELCO, provides, in pertinent part:

> "Within seven days following the FCC's announcement of the lottery results..., the lottery winner shall file with the FCC the paper original and two hard copies of its application."

Section 6(c) provides:

> "In the event a full settlement is not reached in the RSA and a lottery is held, each Party agrees that, in the event this agreement is approved by the FCC, if such approval is required, and the application of a Party to this agreement is selected by the FCC, said Party shall assign its right in the construction permit to the Partnership, contemplated hereby, and other parties to this agreement shall not pursue their applications or take any action to seek dismissal of an application of any other Party to this agreement."

Thus, if a full settlement in the RSA was not reached, as it was not, the triggering event giving rise to the parties' obligations and rights under the agreement was a victory by one of them in the lottery. In the absence of that, the agreement was of no force and effect, for it created no filing obligations on the

part of a lottery winner and thus no right to acquire ownership interests in the eventual permittee on the part of the other signatories.

Settling Parties ignore the fact that the lottery was not won by a party to the agreement and assert, in essence, that although the agreement never became operative and none of the parties to the agreement ever had any duties to perform under it, that TDS, a non-party, somehow gained interests in other applications through the operation of the agreement sufficient to cause TDS's own application to violate the rules, thus warranting its dismissal. Such reasoning is self serving and unsupported by precedent or logic.

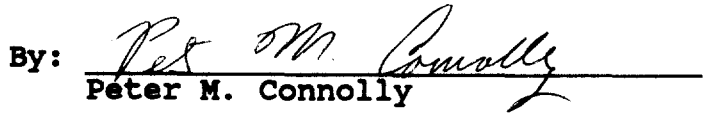
"Interests" created by settlement agreements, which may never come into existence, can hardly be held to violate Section 22.921(b)(1), which, by its terms, applies only to interests in "applications" actually filed with the Commission.

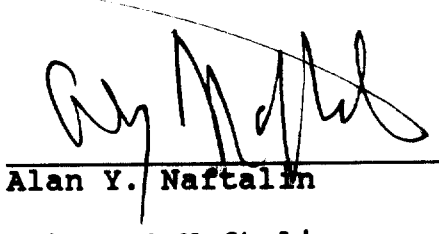
Conclusion

For the foregoing reasons, and those furnished in our "Contingent Application For Review," Settling Parties' Application For Review Should be denied and TDS's construction permit grant should be reaffirmed.

Respectfully submitted,

TELEPHONE AND DATA SYSTEMS, INC.

By: 
Peter M. Connolly

By: 

Alan Y. Naftalin

Koteen & Naftalin
1150 Connecticut Ave., N.W.
Washington, D.C.

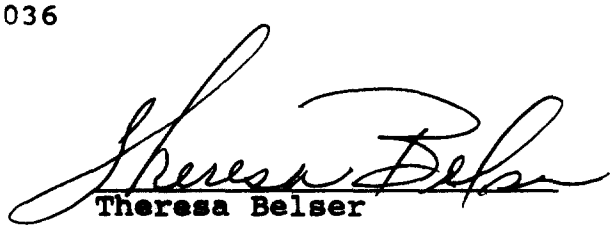
March 26, 1991

Its Attorneys

Certificate of Service

I, Theresa Belser, a secretary in the offices of Koteen & Naftalin, hereby certify that I have served a true copy of the foregoing "Opposition" on the following, by First Class United States mail, this 26th day of March, 1991:

Kenneth E. Hardman, Esq.
2033 M Street, N.W.
Suite 400
Washington, D.C. 20036



Theresa Belser